

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BARBARA A. EARNHEART**

Claimant

VS.

**HALLMARK CARDS, INC.**

Self-Insured Respondent

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Docket No. 1,015,055

**ORDER**

Respondent appealed the September 27, 2005, Award entered by Administrative Law Judge Brad E. Avery. After reviewing the parties' briefs, the Board placed this appeal on its summary docket for disposition without oral argument.

**APPEARANCES**

David C. Byerley of Kansas City, Missouri, appeared for claimant. John David Jurcyk of Roeland Park, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award.

**ISSUES**

This is a claim for a back injury and repetitive trauma injuries to claimant's hands and wrists that claimant allegedly sustained while working for respondent.

In the September 27, 2005, Award, Judge Avery determined claimant was entitled to receive workers compensation benefits for a 54 percent permanent partial general disability due to claimant's bilateral upper extremity injuries. The Judge found respondent paid claimant her regular paycheck during those periods she was entitled to receive temporary total disability benefits and temporary partial disability benefits. Accordingly, the Judge held that respondent had "more than satisfied its obligation under the Workers Compensation Act, and no additional temporary total compensation or temporary partial

compensation is due the claimant.”<sup>1</sup> And when computing the number of weeks for which claimant was entitled to receive permanent partial general disability benefits, the weeks that claimant qualified for temporary total disability and temporary partial disability benefits were not utilized in the mathematical formula. Likewise, when computing the total sum of all disability benefits that claimant was entitled to receive, none of the monies that respondent paid claimant during those periods of temporary disability were included in the mathematical computation. Consequently, the Judge awarded claimant 224.10 weeks of permanent partial general disability benefits at \$440 per week for a total award of \$98,604.

Respondent contends Judge Avery erred. Respondent argues claimant requested and, indeed, should have been awarded 32 weeks of temporary total disability benefits that total \$14,080 and four weeks of temporary partial disability benefits that total \$880. But respondent also contends K.S.A. 44-510f(b) is applicable and, therefore, it should be deemed to have paid those temporary disability benefits as it continued to pay claimant her regular wages. Consequently, respondent argues those temporary benefits should have been included in computing claimant’s permanent partial general disability benefits, which would have yielded an award of 213.84 weeks of permanent partial general disability benefits. Moreover, due to the \$100,000 limit on awards imposed by K.S.A. 44-510f, respondent contends claimant’s permanent partial general disability benefits are limited to \$85,040 (\$100,000 maximum award less \$14,960 of temporary disability benefits). In short, respondent requests the Board to modify the Award to correct those alleged errors.

Conversely, claimant requests the Board to affirm the September 27, 2005, Award. Claimant argues K.S.A. 44-510f(b) is not applicable. Claimant contends the statute only applies when there is a lump sum settlement and, more importantly, when an employer voluntarily pays unearned wages. And in this instance, claimant argues the payments received by claimant during the periods she was temporarily disabled represented sick leave and short-term disability benefits, which she was entitled to receive under an employer-employee agreement.

The only issue before the Board on this appeal is how to treat claimant’s temporary disability benefits for purposes of computing her award.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the parties’ arguments, the Board finds and concludes:

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<sup>1</sup> ALJ Award (Sept. 27, 2005) at 5.

The parties do not dispute that claimant is entitled to receive permanent disability benefits under K.S.A. 44-510e for a 54 percent permanent partial general disability. Moreover, respondent does not dispute claimant should have been awarded 32 weeks of temporary total disability benefits and four weeks of temporary partial disability benefits. As indicated above, the only issue now before the Board is the manner of treating those weeks of temporary benefits for purposes of computing claimant's award.

Reviewing the parties' stipulations at the regular hearing and reviewing the parties' submission letters to Judge Avery reveals that respondent did not claim a credit for the monies it paid to claimant during her periods of temporary disability. That would explain why the Judge did not address such issue in the September 27, 2005, Award and why so little evidence was presented about those payments.

The evidence regarding the monies claimant received during her periods of temporary disability is scant. According to claimant, she was paid sick pay and short-term disability benefits after her sick pay ran out.<sup>2</sup> In addition, claimant later began receiving long-term disability benefits.

Respondent stipulated that it had paid claimant no temporary disability benefits. Respondent, however, claims it continued paying claimant a regular paycheck while she was temporarily disabled and, therefore, it should receive a credit for those monies under K.S.A. 44-510f(b), which provides:

If an employer shall **voluntarily pay unearned wages** to an employee in **addition to and in excess of any amount of disability benefits to which the employee is entitled** under the workers compensation act, **the excess amount paid shall be allowed as a credit** to the employer in any final lump-sum settlement, or may be withheld from the employee's wages in weekly amounts the same as the weekly amount or amounts paid in excess of compensation due, but not until and unless the employee's average gross weekly wage for the calendar year exceeds 125% of the state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto. **The provisions of this subsection shall not apply to any employer who pays any such unearned wages to an employee pursuant to an agreement between the employer and employee or labor organization to which the employee belongs.** (Emphasis added.)

The statute addresses only those payments that exceed the disability compensation that an injured worker is entitled to receive. Therefore, it is only by implication that the statute would be applicable to this appeal. Nevertheless, the statute also provides that a

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<sup>2</sup> R.H. Trans. at 61.

credit is not applicable when the unearned wages are paid pursuant to an agreement between the employer and either the worker or the worker's labor organization.

"[W]hen a statute is clear and unambiguous, the court must give effect to the legislative intent therein expressed rather than make a determination of what the law should or should not be. Thus, no room is left for statutory construction."

"When determining whether a statute is open to construction, or in construing a statute, *ordinary words are to be given their ordinary meaning, and courts are not justified in disregarding the unambiguous meaning. . . .*"

When reviewing questions of law, a court may substitute its opinion for that of the administrative agency. Where the language used is plain, unambiguous, and appropriate to an obvious purpose, the court should follow the intent as expressed by the words used. The courts are to give language of statutes their commonly understood meaning, and it is not for the courts to determine the advisability or wisdom of language used or to disregard the unambiguous meaning of the language used by the legislature.<sup>3</sup>

Claimant's testimony is uncontradicted that she received sick pay and short-term disability benefits during her periods of temporary disability. The record fails to disclose whether those payments were made pursuant to an agreement or whether the payments were gratuitous.

The Board concludes respondent's request for a credit to offset claimant's temporary disability benefits should be denied. First, the credit was not requested and, therefore, the issue was not raised to the administrative law judge. Consequently, the issue should not be considered for the first time on appeal. Second, assuming that K.S.A. 44-510f(b) is even applicable, respondent has failed to establish that it is entitled to a credit as the evidence fails to establish that the payments in question were either unearned or gratuitous as opposed to being paid pursuant to an agreement.<sup>4</sup>

Based upon the above, claimant is entitled to receive an award for the temporary disability benefits in question. Accordingly, the Award should be modified to grant claimant

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<sup>3</sup> *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 980-981, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996) (alteration in original) (citations omitted).

<sup>4</sup> See *Knelson v. Meadowlanders, Inc.*, 11 Kan. App. 2d 696, 732 P.2d 808 (1987).

32 weeks of temporary total disability benefits at \$440 per week, or \$14,080, and four weeks of temporary partial disability benefits at \$320.53 per week, or \$1,282.12.<sup>5</sup>

**AWARD**

**WHEREFORE**, the Board modifies the September 27, 2005, Award as follows:

Barbara A. Earnheart is granted compensation from Hallmark Cards, Inc., for a February 26, 2004, accident and resulting disability. Based upon an average weekly wage of \$961.54, Ms. Earnheart is entitled to receive 32 weeks of temporary total disability benefits at \$440 per week, or \$14,080.

Ms. Earnheart is entitled to receive a total of \$1,282.12 in temporary partial disability benefits.

Ms. Earnheart is entitled to receive 192.36 weeks of permanent partial general disability benefits at \$440 per week, or \$84,637.88, for a 54 percent permanent partial general disability.

The total award is not to exceed \$100,000.

As of December 20, 2005, Ms. Earnheart is entitled to receive 32 weeks of temporary total disability compensation at \$440 per week in the sum of \$14,080, plus \$1,282.12 in temporary partial disability compensation, plus 92.72 weeks of permanent partial general disability compensation at \$440 per week in the sum of \$40,796.80, for a total due and owing of \$56,158.92, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$43,841.08 shall be paid at \$440 per week until paid or until further order of the Director.

Respondent's request for a credit to offset claimant's temporary disability benefits is denied.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

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<sup>5</sup> Weekly compensation for temporary partial disability benefits is 66⅔ percent of the difference between the average gross weekly wage the worker was earning before the work-related injury as provided in the Workers Compensation Act and the amount the worker is actually earning after the injury, subject to the maximum compensation rate. See K.S.A. 44-510e. Accordingly, the weekly compensation rate for claimant's temporary partial disability benefits is calculated as follows:  $\$961.54 - \$480.77 = \$480.77 \times .6667 = \$320.53$ .

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David C. Byerley, Attorney for Claimant  
John David Jurcyk, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director